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Supreme Court, U.S.
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No. 03-1721

In The

Supreme Court of the United States

LUCRETIA G. VINTILLA,

Petitioner,

v.

CITY OF ROCKY RIVER, OHIO, R. BIRD,

Respondents.

On Petition ForWrit of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner respectfully moves this Court for an order (1) vacating the denial of the petition for writ of certiorari entered on October 4, 2004, and (2) granting the petition. As grounds for this motion, petitioner states the following.

Preliminary Statement

The Court of Appeals held that the "lower (district) court properly granted summary judgment in favor of Bird because he is entitled to qualified immunity." There is no proof in the record that the district court granted summary judgment in favor of Bird or for the other respondents either at their request or pursuant to and in compliance with the provisions of Rule 12(b)(6) and Rule 56, Fed. R. Civ. Proc.

The record does show that the district court denied petitioner's motion for summary judgment and that it granted respondents' motion to dismiss the complaint for failure to state a claim for relief. Accordingly, the court dismissed the complaint with prejudice. This is the extent of the district court's journal entries.

The record also shows that the lower court did not rule on substantial issues on appeal such as petitioner's motion for summary judgment, the section 1983 due process insurance question and the liability of the City of Rocky River under Brandon v Holt, 469 U.S. 464. The section 1983 substantive due process issue was mentioned cryptically. The court affirmed the dismissal of the Fourth Amendment claim for failure to allege it in the complaint, without affording the petitioner an opportunity to amend.

Petitioner believes that a scrutiny of the record and a review of the established relevant law vis a vis the conduct and actions of the lower court will demonstrate that the court has so far departed from the usual course of judicial proceedings as to warrant the exercise of this Court's supervisory powers.

PRIVATE CONTRACTUAL RIGHT CAN CONSTITUTE A PROPERTY INTEREST ENTITLED TO DUE PROCESS PROTECTION FROM GOVERNMENTAL INTERFERENCE UNDER FEDERAL CONSTITUTIONAL LAW

Petitioner's insurance company declared her at fault for the December 10, 2000 auto accident, cancelled her policy, and issued a new one at a substantial increase in the premium.

The uncontroverted evidence shows that Bird had caused the cancellation of the petitioner's policy and the subsequent increase in the premium by falsely declaring petitioner as the guilty party for the accident, and by placing that information in a sworn complaint which became a part of the official record of the court. In doing so, Bird made the information accessible and facially reliable to the insurance company and the general public. Had Bird not lied in stating that petitioner violated the law and caused the accident, there would have been no basis for the insurer to cancel the policy and to issue a new one with an increase in the premium.

The property interest which petitioner asserts she has been deprived of without due process derives from the insurance contract between her and the insurer. Petitioner has a contractual right to the stability of the insurance premium as agreed upon with her insurance carrier. The increase in the premium suffered by petitioner is due directly to Bird's unlawful action, and thus constitutes governmental

interference with a property interest entitled to due process protection under federal constitutional law. The district court disagreed, and the lower court ignored the issue.

Under Ohio law, the right to contract is a property right specifically guaranteed by the State Constitution. Mertik v Blalock, 983 F.2d 1353 (6th Cir. 1993). Joseph Bros. v Brown, 65 Ohio App. 2d 43; 415 N E 2d, 987, 990 (1979), held:

Brock v Roadway Express, Inc., 481 U.S. 252 (1987) makes clear that a private contractual right can constitute a property interest entitled to due process protection from governmental interference under federal constitutional law.

PROSECUTION WITHOUT PROBABLE CAUSE IS A CONSTITUTIONAL TORT ACTIONABLE UNDER SECTION 1983 IF THE CONDUCT WHICH PROMPTED THE PROCEEDING IS EGREGIOUS, ARBITRARY ABUSE OF GOVERNMENTAL POWER THAT SHOCKS THE CONSCIENCE.

The question presented is whether Bird's official conduct rose to the level required for a violation of substantive due process' guarantee under the Fourteenth Amendment? Stated otherwise, whether Bird's actions and behavior were so egregious that it may be fairly said to shock the conscience?

Officer Bird, who swore under oath to the criminal complaint that he executed and filed against the petitioner, either knew or should have known that he did not have probable cause against the petitioner, that an affidavit or a sworn statement can be executed only on personal knowledge of the factual statement or statements asserted, and that an untrue oath is perjurus.

As stated by Justice Stevens in his dissent in Albright v Oliver, 510 U.S. at 293: "...commencement of a serious criminal proceeding on such 'scanty grounds' is nothing short of 'shocking'". See n 5. Paraphrased for the instant case "... commencement of a serious criminal proceeding on 'perjured testimony' is nothing short of shocking".

At 295-296, he observed:

...The initiation of a criminal prosecution, regardless of whether it prompts arrest, immediately produces "a wrenching disposition of every day life" (citation omitted). Every prosecution, like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (citation omitted).

At 299, Justice Stevens continues:

> Our cases make clear that procedural regularity notwithstanding, the Due Process clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused.

And at 300 of the dissent, it is stated:

> Even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which "no rational trier of fact" could base a finding of probable cause, (citation reference omitted), simply does not comport with the requirements of the Due Process Clause.

The integrity of our judicial system is not helped by the tolerance of perjury by a law enforcement officer.

PETITIONER'S COMPLIANCE WITH THE COMMAND OF THE SUMMONS IN LIEU OF WARRANT TO APPEAR IN COURT TO ANSWER THE CHARGE FILED AGAINST HER CONSTITUTED A SEIZURE FOR PURPOSES OF THE FOURTH AMENDMENT

The district court held that since petitioner has not "alleged that she was seized", "she cannot establish a Fourth Amendment violation." The lower court agreed.

The appropriate response to the lower court's ruling that petitioner "cannot establish a Fourth Amendment violation" because she was not "seized" was given by Justice Ginsburg in her concurring opinion in Albright v Oliver, at 279, to wit: the fact the petitioner was not incarcerated to await trial,

> "... should not lead to the conclusion that a defendant released pretrial is not still 'seized' in the constitutional sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence 'seized' for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court".

Petitioner's compliance with the command to appear in court to answer the charge lodged against her by Bird constituted a seizure for purposes of the Fourth Amendment

FEDERAL PRACTICE EXPRESSLY PERMITS AMENDMENTS TO CURE INADEQUATE JURISDICTIONAL ALLEGATIONS

The underlying rationale for the practice of permitting amendments to cure inadequate or defective pleadings was stated in .Foman v Davis, 371 U.S. 178, 181 (1962), as follows:

> The Federal Rules of Civil Procedure reject the approach that a pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleadings is to facilitate a proper decision on the merits. Conley v Gibson, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed to secure the just, speedy and inexpensive determination of every action. Rule 1.

The lower court held "Vintilla's malicious prosecution claim fails because she did not allege a Fourth Amendment claim".

Admittedly, petitioner did not specifically allege the Fourth Amendment as one of the federal constitutional rights that Bird had violated in his actions against her. However, the record contains sufficient undisputed evidence to show that petitioner is entitled to the protection of the amendment.

Petitioner is entitled to amend the complaint to conform to the undisputed evidence in the record that demonstrates the existence of a fourth amendment question

In Commercial Union Ins. Co. v United States, 999 Fed 2d 581, 585-586 (D.C. Cir. 1993), the court permitted

the plaintiff to amend to correct flawed allegations since federal jurisdiction was based on facts already in the record.

Wolf v Marsh, 846 F.2d 782 at 785, n. 4, states:

> (see generally 28 U.S.C. section 1653 allowing amendment of defective allegations as to jurisdiction at the appellate court level). It must be remembered that this is an exception to the rule that a complaint that does not properly allege the requisite jurisdictional elements is defective, subject to dismissal with leave to amend. The exception is permitted on grounds of judicial economy and to insure that plaintiff is not denied his day in court on the basis of technical flaws in the pleading.

This Court has held that plaintiffs, even at a late stage, would be entitled to amend their complaint, and the Court would treat the complaint to conform to the proof. Justice Stevens in Brandon v Holt,* 469 U.S. 464, 471 stated:

> Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact. (See n. 19 "amendment to conform to the evidence may be made at any time"). (Rule 15(b) amendment allowed "so long as opposing party has not been prejudiced in presenting his case"). (Rule 15(b) is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading

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* Whether the City of Rocky River is a proper party to this action has been answered by Brandon. Bird represents the City when he acts as a law enforcement officer of its police department.

skills of counsel"). See Schlesinger v Councilman, 420 U.S. 738, 744, n. 9.

The record reveals that petitioner was served with a Summons in Lieu of Warrant commanding her to appear before a Judge of the Rocky River Municipal Court to plead to the charge that she violated Section 331.1(a) of the City's Traffic Code and thereby caused an accident. The summons was provoked by and based on a false charge in a sworn complaint filed by Bird. In response to the summons, petitioner appeared in court with counsel and entered a plea of not guilty. The case was set for trial, at which time petitioner appeared in court with her lawyer prepared to defend against the charge. While awaiting the call to trial, Bird determined to dismiss and did dismiss the complaint on his initiative.

The lower court has held that petitioner cannot show a Fourth Amendment violation because she was not "seized". In Albright v Oliver, at 279, Justice Ginsburg dealt with this issue head-on, and held that a person's compliance with a summons in lieu of warrant to appear in court to answer a charge against him constitutes a "seizure" for purposes of the Fourth Amendment.

Clearly, petitioner is entitled to amend the complaint to conform to the proof in the record.

SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

The district court denied petitioner's motion for summary judgment. The lower court did not consider the petitioner's appeal of the district court's decision on the issue.

Petitioner's motion for summary judgment was supported by the verified complaint affidavits, exhibits and brief pursuant to Rule 56, Federal Rules of Civil Procedure. The evidence proffered by the petitioner in support of the motion established the absence of a genuine issue of material fact. Respondents failed to present any evidentiary material to counter petitioner's evidence as required by Rule 56(e). This rule states: "...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.* (Italics supplied).

The record is devoid of any probative material presented by Bird to defeat petitioner's motion for summary judgment as required by Rule 56.

Petitioner submits that she has presented material facts which have not been genuinely disputed and that respondents have not met their burden of presenting appropriate evidence to create a genuine issue of material fact, making it necessary to resolve the dispute at trial.

CONCLUSION

The blatant violation of petitioner's property and liberty interests secured to her by the Constitution has been condoned by the lower court. A travesty of justice has occurred below.

The decision does violence to the established rules of law in refusing to right a wrong. It serves no valid purpose to allow an incorrect decision to remain in the body of law.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari,, petitioner urges the Court to grant the petition for a rehearing, to vacate its order of October 4, 2004 denying the writ, and to entertain the petition for a writ of certiorari.

Respectfully submitted,

John R. Vintilla
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I express a belief based on a reasoned and studied professional judgment that the petition for a writ of certiorari involves undisputed facts and issues of law which have been overlooked and/or misapprehended by this Court in considering and ruling on said petition. Therefore, petitioner requests a rehearing of the petition for a writ of certiorari for the reasons set forth in said petition.

I certify that the petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

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